CASE NO. 83-881

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

SHO-ME POWER CORPORATION, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL UNION 53, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Eugene E. Andereck
Erwin L. Milne
Counsel of Record
Craig S. Johnson
STOCKARD, ANDERECK, HAUCK,
SHARP & EVANS
101 West McCarty Street
Post Office Box 1280
Jefferson City, MO 65102
Telephone: (314) 634-3422

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QUESTIONS PRESENTED

1. Does the arbitration award, on its face as a matter of law, draw its essence from the collective bargaining agreement, or does it draw its essence from the arbitrator's own brand of industrial justice?

The award found cause existed for summary discharge, found unlawful motivation on behalf of management in not executing discipline until after the employee had engaged in collective bargaining activities, ultimately found cause, as contractually construed, did not exist, reinstated the employee without backpay, and set forth the rationale that "to allow the discharge to stand would result, in the arbitrator's judgment, in too chilling an effect upon the free exercise of the fundamental right of Grievant and each of his fellow employees to engage in concerted activities and to bargain collectively with the employer."

2. Do the "draw its essence" and "own brand of industrial justice" standards announced by this Court in the "Steelworker's Trilogy" provide adequate, meaningful or precise standards for federal courts reviewing enforceability of labor arbitration awards?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Sho-Me Power Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. D) is reported at 715 F.2d 1322. The opinion of the district court (App. C) is not reported.

JURISDICTION

The judgement of the court of appeals (App. D) was entered on September 1, 1983. A motion for stay of mandate was denied September 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. No constitutional provisions are directly involved.

2. Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without respect to the citizenship of the parties.

3. Section 203(d) of the Labor Management Relations Act of 1947, 61 Stat. 154, 29 U.S.C. 173(d) provides:

"Final adjustment of a method agreed upon be the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement...".

STATEMENT

1. In 1947, Congress passed the Labor Management Relations Act with included sections 301(a) and 203(d), providing for arbitral resolution of dispute over collective bargaining agreements, and district court jurisdiction of disputes for violation of those agreements. 61 Stat. 154, 156, 29 U.S.C. 173(d), 185(a).

2. This court, in a 1957 opinion by Mr. Justice Douglas, Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, held that, under § 301 of the LMRA federal courts have authority to decide labor contract controversies, and to fashion a body of federal law pertaining to enforcement of those contracts.

3. In a 1960 opinion by Mr. Justice Douglas, this Court, in what has become known as the "The Steelworker's Trilogy", set forth significant principles pertaining to arbitration and award components of collective bargaining agreements. United Steelworkers of America v. American

Manufacturing Co., 363 U.S. 564; United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574; and United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593. In particular, the Enterprise Wheel decision announced guidelines to be followed in determining the enforceability of awards rendered pursuant to collective bargaining agreements. The Enterprise Wheel guidelines are paraphrased as follows:

a) [federal] courts should refuse to review the merits of an arbitration award (p. 596);

b) ambiguity in the opinion accompanying the award permitting the inference the arbitrator exceeded his authority is insufficient reason for refusing enforcement (p. 598);

c) question of interpretation of the collective bargaining agreement is for the arbitrator, and [federal] courts have no business overruling his interpretation (p. 599).

d) an arbitrator is confined to interpretation and application of the collective bargaining agreement, he does not sit to dispense his own brand of industrial justice. (p. 597); and

e) an award is legitimate only so long as it draws its essence from the collective bargaining agreement. When

> the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award (p. 597).

4. Since the Steelworker's Trilogy, this Court has set forth further pronouncements defining arbitrator's authority, and hence, the enforceability of their awards. Most notable is the decision contained in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), opinion by Mr. Justice Douglas.

The Gardner-Denver decision, at pages 53-54, states that "if an arbitral decision is based solely upon the arbitrator's view of the requirements of enacted legislation rather than an interpretation of the collective bargaining agreement, the arbitrator has exceeded the scope of the submission, and the award will not be enforced...".

5. Petitioner (hereinafter "Sho-Me") and Respondent (hereinafter "Union") were parties to a collective bargaining agreement at all times material to the disputes of this case. The pertinent provisions of this agreement are set forth in Appendix A. On July 21, 1981, Sho-Me discharged

from its employment a member of the Union on grounds of dishonest attempts to shift personal expenses to Sho-Me. The facts surrounding the incidents, as found by the arbitrator, are contained in his decision and award, Appendix B.

The matter was subjected to the grievance and arbitration provisions of the contract, and the decision and award contained in Appendix B was rendered February 24, 1982.

6. Arbitral Decision and Award. Paraphrased from Appendix B, the underlying chronology of facts as found by the arbitrator are as follows:

> June 5-June 10, 1981. Despite reminders of the normal Sho-Me policy that the employee would be responsible for additional accommodation charges for his family's lodging, the employee in question "repeatedly, boldly and blatantly attempted to engage the owner of the resort in a dishonest scheme to shift the financial burden of his family's lodging from himself to the Employer". (App. B, pp B2-7, B19-26);
>
> June 11-July 21, 1981. Management learned of the incident and contacted the resort owners, who informed it that the employee was not welcome in the future. During this period Sho-Me and the Union were engaged in collective bargaining negotiations, of which the employee was an outspoken opponent against ratification.

On July 21, after ratification, the employee was discharged on the basis of his actions between June 5 and June 10. (App. B, pp B7-14).

The conclusions reached by the arbitrator are as follows:

> The contractual standard of "discharge for cause" (App. A, p A5) was interpreted to mean "[I]f the circumstances surrounding the employee conduct are sufficiently egregious, summary dismissal is warranted unless management's reaction to the employee conduct can be shown to be unreasonable, arbitrary or capricious" (App. B, pp B19-20; App. C, pp C10-11).
>
> Standing alone, the employees conduct merited a finding that management had "cause and cause again" to summarily dismiss the employee. However, management in delaying the discharge, interposed an intervening cause, and took the chance nothing would happen in the interim effecting the cause determination. Due to the events in the intervening period, it was determined the discharge was motivated, at least in substantial part by the employee's union activities (App. B, pp B12-25).
>
> Based on the foregoing findings, the arbitrator ultimately decided the discharge was "not proper" under the agreement. He found the employee deserving of serious discipline, but could not allow the discharge to stand for fear it "would result, in the arbitrator's judgment, in too chilling an effect upon the free exercise of the fundamental right of Grievant and each of his fellow

employees to engage in concerted activities and to bargain collectively with the Employer". A financial loss was imposed because of his dishonest conduct. (App. B, pp B25-27).

The award was to sustain the grievance, reinstate the employee with the financial loss, and other measures. (App. B, p B27-28).

7. District Court Decision. Disputing the enforceability of the award and decision, the matter was litigated before the Southern Division of the United States District Court for the Western District of Missouri. Jurisdiction arose under 29 U.S.C. 185(a) and 28 U.S.C 1337. On July 30, 1982, the Honorable Russell G. Clark granted Sho-Me's summary judgment motion denying enforcement. (App. C).

In ruling the award did not draw its essence from the agreement, Judge Clark accepted the arbitrator's construction of "cause" to prohibit unreasonable, arbitrary, or capricious management action. Because the award was based on preception of management motivation, it was decided the arbitrator had not followed his own construction.

Citing provisions of the decision and award wherein the arbitrator admitted it was based on his own interpretation of desirable social policy, the District Court held the arbitrator had dispensed his own brand of industrial justice.

> "Although the arbitrator had interpreted the collective bargaining agreement to prohibit only unreasonable, arbitrary, or capricious Management action, the arbitrator ultimately based his award upon his perception of the motivation underlying management action which was acceptable in all other respects. The arbitrator previously had not interpreted the collective bargaining agreement to impose such a restriction, and frankly admitted that his award was based solely upon his own interpretation of desirable social policy. Thus, the arbitrator reasoned that [t]o allow the discharge to stand would result, in the Arbitor's judgment, in too chilling an effect upon the free exercise of the fundamental right of Grievant and each of his fellow employees to engage in concerted activities and to bargain collectively with the Employer." As the Supreme Court stated in Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), "an arbitrator is confined on interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice... When an arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (App. C, pp C8-12).

8. Circuit Court of Appeals Decision. By opinion filed September 2, 1983, the Eighth Circuit

reversed the District Court (Appendix D). The Eighth Circuit relied upon doctrines of construction of awards in holding this award drew its essence from the collective bargaining agreement. (App. D, pp D7-17).

The court accepted the arbitrator's interpretation of the agreement, stating it could not interfere with this construction unless there was "positive assurance" the contract was not susceptible to that construction. (App. D, pp D14-16). Having determined it would not disturb the arbitrator's contractual construction, the Court concluded the award drew its essence from the agreement. (App. D, p D16). There was no discussion of how the District Court's reasoning was erroneous, nor was there discussion of Sho-Me's contention, (and District Court's conclusion) that the essence was drawn from the arbitrator's own interpretation of social policy. (App. C. p C11-12).

REASONS FOR GRANTING THIS PETITION

This case presents an important question of federal law as to an arbitrator's authority to modify discipline based upon his own interpretation of employee rights not expressed in the contract.

This case presents an important question as to the extent of an arbitrator's authority to construe a collective bargaining agreement, the answer to which conflicts among the Circuit Courts of Appeal.

QUESTION 1

As the district court reasoned, it is patent from the award that the arbitrator's idea of desirable policy, and not his construction of the agreement, was the basis for the award. (App. C, pp C10-11). Having interpreted the contractual standard of "cause" to embody "summary dismissal if management's reaction to sufficiently egregious conduct is not unreasonable, arbitrary or capricious", (App. B, p B19), this interpretation was not followed in fashioning a award. The award found the conduct sufficiently egregious to merit a loss of backwages,

but ordered reinstatement. In so doing, the arbitrator abandoned his own contractual interpretation in favor of a disposition based upon policy considerations foreign to the agreement.

Belying his construction in arriving at the award, it seems readily apparent the "essence" of the award was based upon the arbitrator's perception of "chilling effects", not on the simple contractual provisions of "discharge" and "cause", and not upon management reaction. As stated in the Enterprise Wheel segment of the Steelworker's Trilogy, 363 U.S. 593, 597:

> "an arbitrator is confined to interpretation and application of the collective bargaining agreement, he does not sit to dispense his own brand of industrial justice... When an arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (emphasis added).

This principle has been further elucidated by this Court:

> "If an arbitral decision is based "solely upon the arbitrator's view of requirements of enacted legislation," rather than on an interpretation of the collective bargaining agreement, the arbitrator has "exceeded the scope of the submission", and will not be enforced. Ibid., thus the arbitrator has authority to resolve only questions of contractual rights. "Alexander v. Gardner-Denver Co., 415 U.S. 36, 53-54, (1974), citing in part the Enterprise Wheel decision, 1.c.597

and

> "Even though a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so. An arbitrator's power is both derived from and limited by, the collective bargaining agreement... His task is limited to construing the meaning of the collective bargaining agreement, so as to effectuate the collective interest of the parties." Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 744 (1981).

Arbitrator Eisler's concern for the fundamental employee rights to engage in concerted activity and to bargain collectively is a concern protected by the guarantees of the National Labor Relations Act. See 29 U.S.C. 157, 158. Although the arbitrator had authority to determine the contractual dispute as to cause for discharge, he did not have authority to decide a statutory National Labor Relations Act claim of discharge motivated by union activity. Under the aforementioned directives from this Court, it is patent from the award that the arbitrator engaged in the forbidden. The agreement did not by its terms prohibit discipline for concerted activities, and cannot be so construed.

The inescapable conclusion is that the contract provided no basis for the award's essence to be

drawn on considerations of employee rights. The award did not emanate from the wording of the contract, the issue submitted, or the arbitrator's construction of the contract. It was solely and singularly based upon the arbitrator's personal solution to the grievance. It is beyond dispute that the arbitrator was punishing both management and the employee. If the arbitrator found cause did not exist, the employee should not have been financially penalized. If cause existed, the award violated management rights to investigate and delay discipline pending labor negotiations. How does guilty or cause cease to exist by the mere lapse of time?

This Court is urged to consider that the award, on its face, violated the prohibition of Enterprise Wheel. Clearly, the essence of the award was drawn from the arbitrator's personal view of rights collateral to the contract. Hence the award must be vacated, and this Court should grant certiorari to so consider and order.

QUESTION 2

Under the Enterprise Wheel decision of the Steelworker's Trilogy, the ultimate question for determining enforceability is whether the award "draws its essence" from the collective agreement. The only clarification of the standard is a negative one: "When the arbitrator's words manifest an infidelity to this obligation [to be confined to interpret and apply the agreement; not dispensing his own brand of industrial justice], courts have no choice but to refuse enforcement of the award." 363 U.S. at 597. As is apparent from the plethora of threshhold standards fashioned subsequent to the "essence" determination, the Enterprise Wheel decision provides no meaningful or precise yardstick. Thus, the enforceability question often turns on review standards which, while ostensibly fashioned in view of the "essence" standard, can actually preclude the review intended by this Court.

The Eighth Circuit's decision in this case effected just such a preclusion. The decision only went so far as to decide that the arbitrator's

interpretation of the agreement drew its essence from that agreement. There was no discussion of whether the interpretation, application of that interpretation, and resultant decision drew its essence from the contractual provisions:

> "Courts cannot interfere with an arbitrator's interpretation unless it can be said with positive assurance that the contract is not susceptible of the arbitrator's interpretation." (App D, p D14)

The standards utilized by the Eighth Circuit derived from a history of judicial dissatisfaction and frustration with the lack of guidance from the Trilogy. This history is traced through a collection of differing standards and results applied and reached by the various United States Circuit Courts of Appeal.

Enterprise Wheel, infra p. 597, the only direct guideline from this Court, states the ultimate question for determination is "whether the award draws its essence from the collective bargaining agreement". At the other end of the spectrum, enforcement will be denied if the arbitrator applies his own brand of industrial justice. Between these

extremes, the other directives of Enterprise Wheel set the stage for the confusion:

a) federal courts must decline to review the merits of the award, p 596;

b) mere ambiguity permitting the inference the arbitrator exceeded his authority is no reason to refuse enforcement, p 598; and

c) question of interpretation of the collective bargaining agreement for the arbitrator, and the courts have no business disturbing his construction, p 599.

Despite the language of Enterprise Wheel, some substantive evaluation of the merits must have been contemplated. It is necessitated by the "essence" standard itself. How can a court find the award does not draw its essence from the contract without some examination of the underlying merits? How can the inference the arbitrator exceeded his authority be drawn without some examination of the underlying merits? If an ambiguity allowing an inference the arbitrator exceeded his authority is insufficient to refuse enforcement, what standard will support a finding of lack of essence? If the courts must blindly accept the arbitrator's construction of the

contract, is it axiomatic that his construction necessarily draws its essence from the contract? If a court cannot review the merits, must accept the arbitrator's contractual construction, and cannot rely on inferences of authority being exceeded, on what basis or by what standard can an award be vacated? Is the arbitrator free to make an unfettered determination of the extent of his own authority?

It would appear the only basis for vacation would be that, on the face of the award, the arbitrator did not apply his own interpretation (which is precisely what the district judge determined), or that something attaining the status of "more than an inference" indicates the arbitrator imposed his own brand of justice.

The uncertainties of these standards and their underlying policy assumptions have been criticized. See Labor Arbitration: A Dissenting View, Paul R. Hays, Yale University Press, 1966; The Supreme Court and Labor Law October Term, 1959, Paul R. Hays, 60 Columbia Law Review 901 (921-935), 1960; Symposium,

Labor Arbitration and Judicial Oversight, Thomas G. S. Christensen, 19 Stanford Law Review 671, 1967; Judicial Review of Labor Arbitration Awards After the Trilogy, C. W. Brinckerhoff, 53 Cornell Law Review 136 (1968).

The following excerpts of case law demonstrate the diverse language used by the circuits to promulgate their own definition of what the standard means.

FIRST CIRCUIT

> "An award will be upheld, unless the arbitrator's choice was "by reason of some circumstance outside the contract itself, so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." International Union of E. R. & MW v. Peerless Pressed Metal, 489 F.2d 768, 769 [2] (1974), cert den. 414 U.S. 1022 (1973); Better Const. v. Boston Edison Co., 560 F.2d 1045, 1050 [5], (1977).

SECOND CIRCUIT

> "Arbitrator's decision that he has authority should not be accepted where the reviewing court can clearly perceive that he has derived that authority from sources outside the collective bargaining agreement at issue." Torrington Company v. Metal Products W.U.L. 1645, 362 F.2d 677, 680 [4] (1966).

THIRD CIRCUIT

> "An award is enforceable if it "can

possibly derive from an interpretation and application of the clauses of the agreement, the courts are precluded from refusing to enforce his award." Sun Petroleum Products Co. v. Oil, Chemist & Atomic Workers, 681 F.2d 924, 927 [2] (1982). Arco Polyers Inc. v. Local 8-74, 671 F.2d 752, 755 (1982).

FOURTH CIRCUIT

"His function is confined to the interpretation and application of the collective bargaining agreement under which he acts and, while he may give his own construction to ambiguous language, he is without authority to disregard or modify plain and unambiguous provisions." Monogahela Power v. Local 2332, IBEW, 566 F.2d 1196, 1199 [2] (1976).

FIFTH CIRCUIT

"Only where there is a manifest disregard of the agreement, totally unsupported by principle of contract construction and the law of the shop, may a reviewing court disturb the award." Communications Workers of America, AFL-CIO v. Western Electric, 397 F.Supp 1318, 1322 [4] affirmed 558 F.2d 816 (1977).

SIXTH CIRCUIT

Enforcement will be denied where the arbitrator "substitut[ed] his discretion for the company's" and his "award...cannot be rationally deduced from the agreement." Timken Co. v. Local Union No. 1123, United Steel Workers of America, 482 F.2d 1012 [4] (1973).

SEVENTH CIRCUIT

"An arbitrator's award does draw its essence from the collective bargaining agreement so long as the interpretation can in

some rational manner be derived from the agreement, reviewed in the light of its language, its context, and any other indication of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principals of contract construction and the law of the shop, may a reviewing court disturb the award." Amoco Oil Co. v. Chemical and Atomic Workers, 548 F.2d 1288, 1294 (1977), cert den. 431 U.S. 905 (1977).

EIGHTH CIRCUIT

"An arbitrator may interpret, construe, or apply the provisions of a collective bargaining agreement if the contract does not limit his authority to do so...unless it can be said with positive assurance that the contract is not susceptible of the arbitrator's interpretation." IBEW Local 53 v. Sho-Me 715 F.2d 1322, 1325 [5] (1983).

NINTH CIRCUIT

Enforce an award where "it is possible for an honest intellect to interpret the words of the contract and reach the result which the arbitrator reached." San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327, 1328 [3] (1969).

"An award that conflicts directly with the contract cannot be [an enforceable] plausible interpretation." Pacific Motor Trucking v. Automotive Machinists, 702 F.2d 176, 177 [1] (1983).

TENTH CIRCUIT

Enforcing an award " is strictly confined to whether the arbitrator interprets and applies the collective bargaining agreement so

that his award is rooted in the agreement." International Brotherhood of Electrical Workers v. Professional Hole Drilling, 574 F.2d 497, 503 [7] (1978).

From this sample, it is clear the differing circuits have conflicting standards because of two separate considerations:

A. Being dissatisfied with the "draw its essence" standard, the circuit courts have attempted to announce definitive standards capable of meaningful application; and

B. Being unwilling to blindly accept the arbitrator's own interpretation of contracts, which is the traditional and usual function of a court of law, the circuits have imposed different standards of review on the arbitrator's interpretation of the collective bargaining agreement.

These differing standards, which can lead and have lead to differing results among the circuits, cry out for clarification from this Court. In this particular case, Sho-Me was denied a review on the merits due to the standards of construction proposed by the Eighth Circuit. Holding the arbitrator's contractual interpretation acceptable, the Eighth Circuit then jumped to the conclusion that the award

itself was enforceable. In this bootstrapping process, the Eighth Circuit did not examine, discuss, or decide whether the arbitrator followed his own contractual interpretation. This was the award's downfall in the district judge's decision, should have been considered by the Eighth Circuit, and should be considered by the Supreme Court of the United States.

Clearly, there is conflict of decisions among the circuits with respect to threshhold standards in evaluating whether an award draws its essence from the collective bargaining agreement. Additionally, there is an obvious conflict with respect to standards regulating the arbitrator's ability to interpret and construe the provisions of the collective bargaining agreement. Both of these conflicts apply to the facts embodied in this Petition, and this Court is urged to utilize this opportunity to clarify the applicable standards, or promulgate new ones.

CONCLUSION

Petitioner Sho-Me Power Corporation respectfully request this Court issue a Writ of Certiorari by granting this Petition.

Respectfully submitted,

Eugene E. Andereck
Erwin L. Milne
Counsel of Record
Craig S. Johnson
STOCKARD, ANDERECK, HAUCK, SHARP & EVANS
101 West McCarty Street
Post Office Box 1280
Jefferson City, MO 65102
Telephone: (314) 634-3422

November, 1983

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Petition for Certiorari was mailed by depositing same in a United States post office or mail box, first class postage prepaid, this 23rd day of November, 1983, to Ms. Marsha J. Murphy, Jolley, Moran, Walsh, Hager & Gordon, 1300 Traders Bank Building, 1125 Grand Avenue, Kansas City, Missouri, 64106, attorneys for IBEW Local 53, and to Mr. Robert D. St. Vrain, Clerk, United States Court of Appeals, Eighth Circuit, United States Court and Custom House, 1114 Market Street, St. Louis, Missouri 63101

Erwin L. Milne

"APPENDIX A: Pertinent Provision of Collective Bargaining Agreement"

Article I: Recognition

Section 2. The Union recognizes that Management of the Corporation, the direction of its working forces, the determination of the number of men it will employ or retain, the right to hire, discharge, promote, demote, transfer, and release employees is vested in and reserved by the Corporation, and subject, however, to the provisions of this Agreement.

Article V: Grievance Procedure

Section 1. Should any differences or disputes arise under any provisions of this Agreement between an employee or a group of employees and a representative of the Corporation, such differences shall be settled in the following manner, and shall receive prompt consideration.

Step 1. The employee or employees and/or the Steward shall discuss the grievance with the immediate supervisor.

Step 2. If no settlement is agreed to, the employee or employees or the steward shall present the grievance in a written form to the departmental supervisor designated by the Corporation to handle grievances for the Department involved. The Departmental supervisor will, within five (5) working days, give a written reply to the grievance.

Step 3. In the event the matter is not satisfactorily adjusted, the Union Committee and/or the Business Manager of the Union, or his representative, shall discuss the grievance with the General Manager of the Corporation or his designated representative.

Step 4. If no settlement is then reached, any matter or matters remaining in dispute shall, at the request of the delegated representative of either or both parties, be submitted to arbitration as follows:

Step 4A. The Arbitration Board shall

consist of one person selected by the Corporation and one person selected by the Union, and these two persons shall select a third party to the Arbitration Board. In the event these two persons fail to agree on a third party to the board, they shall then request the Chairman of the Missouri State Board of Mediation to appoint the third member of the Board. In the event the office of Chairman of the State Board of Mediation is abolished, or in the event there is no Chairman of the State Board of Mediation, or successor thereto, they shall request the American Arbitration Association to supply a list of five (5) names, one to be selected as the third member of the Board by elimination, first one party striking out a name, then the other until one remains. The Corporation and Union arbitration

board members shall not exceed ten (10) days in the selection of the third member before notifying the Chairman of the State Mediation Board or the American Arbitration Association as the case may be.

Step 4B. Each party shall defray the expense of preparing and presenting its own case to the Arbitration Board. The expense, if any, of the odd numbered member of the Board and other incidental expenses mutually agreed to in advance, shall be borne equally by both parties.

Step 4C. All decisions rendered by the Arbitration Board shall be final and binding upon both parties, and shall be in writing and each party shall be furnished with a copy thereof. In no event shall this board have the authority to amend or change any of the provisions of this

Agreement.

The handling of all grievances by the Stewards shall be done during the regular working hours and without the loss of pay. All grievances must be handled promptly and without undue loss of time.

Article VI: Seniority

Section 1. Seniority is a right accruing to employees as a result of length of service with the Corporation which entitles them to preference, qualifications and ability being equal, to retention in service, layoffs, permanent transfers, and in rehiring, providing the employee is able to perform the required duties.

Section 5. Seniority shall be lost by the occurrence of any of the following:

a. Resignation.

b. Discharge for cause.

c. Absence for three (3) working days without notice to the supervisor unless there exist circumstances which make it impossible to

so report.

d. Failure to report to work after recall from layoff.

e. Exceeding leave of absence.

f. Giving false reason for obtaining a leave of absence.

The enumeration of c, d, e and f above shall in no way be construed as eliminating the offense as grounds for discharge for cause.

"APPENDIX B: Decision and Award of Arbitrator"

IN THE MATTER OF ARBITRATION BETWEEN

SHO-ME POWER CORPORATION

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO. 53 AFL-CIO

GRIEVANCE OF STEPHEN THORNTON

THE STATE BOARD OF MEDIATION

STATE OF MISSOURI

DECISION AND AWARD

WILLIAM O. EISLER
ARBITRATOR
6140 NW. WALES RD.
P. O. BOX 9097
KANSAS CITY, MO. 64168

IN THE MATTER OF ARBITRATION BETWEEN SHO-ME POWER CORPORATION, Employer, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 53 Union.	Grievance of Stephen Thornton

Appearances:

Eugene E. Andereck, Esq.
Stockard, Andereck, Hauck, Sharp & Evans
101 West McCarty Street
Jefferson City, MO 65102
(Craig S. Johnson, Esq. with him on the briefs)
for the Employer.

Marsha J. Murphy, Esq.
Jolley, Moran, Walsh, Hager & Gordon
1300 Traders Bank Building
1125 Grand Avenue
Kansas City, MO 64106
for the Union.

DECISION AND AWARD

Pursuant to the Collective Bargaining Agreement between the Parties and at their request, the State Board of Mediation of the Missouri Department of Labor and Industrial Relations, by its letter of September 28, 1981, appointed the undersigned as neutral arbitrator on a tripartite arbitration board. A hearing was held on the 10th day of

December, 1981, at Springfield, Missouri. At the commencement of the hearing, the Parties, by stipulation, waived the provisions of the Agreement requiring a tripartite arbitration board and agreed that the undersigned should act as sole arbitrator in this dispute. After a full and complete evidentiary hearing, the Parties filed briefs on January 18, 1982, and the Employer filed a reply brief on January 25.

Due to their differing views as to whether just cause for the discharge of an employee is required by the Collective Bargaining Agreement, the Parties were unable to agree on a statement of the issue in this case. The Employer suggested "Whether or not the discharge of [Grievant] was proper under the Agreement between Local Union 53 of the I.B.E.W. and Sho-Me Power Corporation?" The Union asks "Was the discharge of [Grievant] for just cause? If not, what is the appropriate remedy?" As is apparent from the discussion below, the Arbitrator views the

Parties' disagreement as an exercise in semantics. Both questions ask the same thing and both require the same answer.

The Employer is a public utility and provides electrical power to rural electric cooperatives which serve primarily the Ozarks region of southern Missouri. Prior to his discharge on July 21, 1981, Grievant was employed by the Employer for approximately five years. When discharged, his job was that of an equipment operator - truck driver.

During the weekend of June 5, 1981, Grievant's foreman called him at his home in Marshfield, Missouri, and advised him that he was being assigned to a crew which would spend the following week at the Company's Gainesville, Missouri, sub-station. the crew would be housed at the Theodoshia Marina and Resort at Theodoshia, Missouri. Grievant told his foreman that his family would accompany him during a portion of the week. The foreman advised him that he would be responsible for any additional

charges at the resort for his family's accommodations.

On Monday, June 8, the crew, including Grievant and his foreman checked into the resort. Grievant and one of his fellow employees were assigned to share one of the units. They told one of the owners of the resort that their families would be joining them the next day and arrangements were made for separate accommodations to house the two of them with their respective families. They were advised by the owner of the resort that there would be an additional charge to accommodate their families. Grievant told her that other motels and resorts in the area did not charge members of crews additionally when their families accompanied them. She explained to Grievant that the resort did not have flat rates for the units but rather charged by the number of persons occupying the unit. These charges were $28.00 per day extra for Grievant's family.

On Tuesday, June 9, Grievant's family arrived. That evening Grievant asked the owner whether she would waive the additional charges. She refused. He suggested that she bill the Employer for the additional charges.[1] She refused to do this. He again told her that other motels and resorts did not charge extra for members of the family and was insistent that she either waive the additional charge or somehow include it in the Company's bill. He suggested that she bill the Company as if he were

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[1] The owner of the resort so testified. Grievant denied suggesting in any way that she should charge the Employer for the cost of his family's accommodations. The Arbitrator simply finds it incomprehensible to conclude that she would have testified as she did, had the events not occurred as she testified that they did. The record in this case is devoid of any evidence which directly or inferentially leads me to conclude that she was not completely truthful. To the extent that Grievant's version of the incidents of June 8, 9 and 10 differ from that of the owner of the resort, her version, and not Grievant's, is credited.

staying in a suite, which she could say was the only thing available, and the Company would therefore be charged for his family's accommodations. She explaired that the resort did not have the suites and that she would not charge the extra amount to the Company.

She checked with Grievant's foreman on Tuesday evening as to how the financial arrangements should be handled regarding the employees whose families were with them. The foreman advised her that the employee would have to pay any additional charges. The foreman again advised Grievant that it was his responsibility to pay for his family's accommodations.

On Wednesday night, when he ultimately paid for the charges for his family as they were leaving the next day, Grievant against attempted to convince the owner that she should either absorb the cost of his family's accommodations or somehow include that cost in the billing to the Company. She again refused,

but did reduce the charge for his family to $20.00 per day.

During these conversations Grievant also complained to the owner about some of the resort's accommodations and the fact that there were additional charges for the use of the tennis courts. Grievant told the resort owner that he had a vote, along with the other members of the crew, as to where the crew stayed and that he would use his influence and vote to see that the crew stayed elsewhere when they were in the Theodoshia area in the future. The resort owner became rather upset and considered his conduct to be a form of harrassment.

Six weeks later, on July 21, Grievant was called into a meeting at the Company's offices in Marshfield, Missouri, by the Employer's General Manager. Also present were Grievant's Union Steward and his foreman. He was advised that he was discharged by the Company and was given the

following letter[2] by the General Manager:

"It has come to my attention that while on Sho-Me business, you and your family stayed the Cook's Marina at Theodoshia, Missouri. You asked (were advised by) your Supervisor Esley Trantham and ~~the Transmission Superintendent, Kenneth McVay, for~~ (that no) special compensation from Sho-Me in the manner of lodging expense ~~to include~~ (would be allowed for) your family. After being denied compensation for your family and during that stay you attempted to coerce the owners into increasing the nightly lodging rate paid by Sho-Me to cover the added cost of your family.

The owners refused your repeated efforts and have advised me that you are no longer welcome at their facilities either as a private guest of the motel or when you are on Sho-Me's business at the company's expense.

Mr. Charles Brown, the Ozark County Prosecutor has advised me that your alleged actions are considered "attempted stealing by deceit" which according to the criminal statutes of Missouri is a class "C" misdemeanor punishable by a maximum fine of $300 and 15 days in jail.

Based on your actions, you are hereby advised that you are immediately terminated. Please contact the Director of Personnel to arrange final settlement of the Sho-Me employee Benefit program

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[2] The words in the letter which appear thusly ~~thusly~~ were scratched out by the General Manager and the words which appear in parenthesis were inserted in the General Manager's handwriting after a discussion between he and Grievant concerning the accuracy of the letter.

During the six week interval between the incidents at the resort and Grievant's discharge, the Employer and the Union were engaged in collective bargaining negotiations for the renewal of the Agreement between them. On July 2, at a Union meeting, the Bargaining Unit voted to reject the Employer's proposal for a new agreement. Strike sanction was requested from the International Union. Negotiations continued between the Parties and on July 20 another Union meeting was held at which time the Bargaining Unit voted to ratify a second proposal made by the company for a new agreement. At both these meetings Grievant was vocal and outspoken against the Company's offers. In the course of his comments to the assembled members of the Bargaining Unit, he spoke of engaging in "sit-ins" and suggested that the employees could succumb to an epidemic of "the blue flu". Other employees spoke against ratification of the Agreement at both meetings but not as strongly as did Grievant.

Prior to his discharge on July 21, the General Manager made no effort to question Grievant about the incidents at the resort. Nor did he question the co-employee with whom Grievant shared accommodations on June 8 and who also had his family with him at the resort.

On July 24, the General Manager met with the Union's Business Manager and a representative of the International Union concerning the discharge. In the course of the conversation the General Manager suggested to the Union's Business Manager that if Grievant would resign his employment with the Company, the Company would not file criminal charges against him. The Business Manager stated that he would convey the message to Grievant but would recommend that he pursue the instant grievance. The Business Manager asked the General Manager why he waited for such a long period of time before discharging Grievant. The General Manager told him that it was because of the Contract negotiations.

During the course of this conversation the General Manager made references to Grievant's remarks at the Union's meetings concerning the blue flu.[3]

The General Manager learned of the incidents at the resort in a telephone call with a person who was not associated with the Company, who told him that he thought the Company was paying for the accommodations of its employees' families at the resort. As a result of that telephone conversation, the General Manager contacted the owners of the resort, who told him of Grievant's conduct and that

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[3] The General Manager denied knowledge of Grievant's participation at the Union's meetings, while acknowledging that he sometimes heard rumors about what went on at Union meetings. He denied being able to recall any mention of the blue flu in his meeting with the Union's Business Manager and the representative of the International Union. He also denied stating that the Company would not file criminal charges if Grievant resigned. The Arbitrator carefully observed the Employer's General Manager during his testimony in this case. His demeanor was argumentative, uncooperative and secretive. His testimony was unpersuasive. To the extent his testimony differs from that of the other witnesses who testified, the other witnesses' testimony, and not the General Manager's, is credited.

he was not welcome as a guest at the resort in the future. The General Manager refused to identify the person who informed him of the incident at the resort when asked by Union's Counsel, explaining that he had promised that person not to do so.

The General Manager explained the delay in discharging Grievant by saying that he was giving the matter very serious consideration during this period. He wanted to see if the owner of the resort would change her mind about refusing to have Grievant as a guest in the future. He finally decided to discharge Grievant because it was going to be necessary to send a crew to Theodoshia and he couldn't have the rest of the crew staying at one place and having Grievant at another.[4]

The applicable Collective Bargaining Agreement contains the following pertinent contractual provision:

"Article I. Section 2. The Union recognizes that Management of the Corporation, the direction of

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[4] The Arbitrator does not credit the General Manager's explanation.

its working forces, the determination of the number of men it will employ or retain, the right to hire, discharge, promote, demote, transfer, and release employees is vested in and reserved by the Corporation, subject, however, to the provisions of this Agreement.

Article V. Section 4C. All decisions rendered by the Arbitration Board shall be final and binding upon both parties . . . . In no event shall this Board have the authority to amend or change any of the provisions of this Agreement.

Article VI. Seniority. Section 1. Seniority is a right accruing to employees as a result of length of service with the Corporation which entitles them to preference, qualifications and ability being equal, to retention in service, . . . providing the employee is able to perform the required duties.

Section 5. Seniority shall be lost by the occurrence of any of the following: . . .
b. Discharge for cause . . . .

For the reasons hereinafter stated, the Arbitrator finds that the discharge of Grievant was not proper under the Agreement between the Parties.

The Employer argues that the controlling provision of the Contract in this case is the Management Rights clause and points out that it does not require "just cause" or any other standard before Management can exercise its power of

discharge. The Argument continues that Article VI deals with seniority and does not deal with discharges.[5] Management, while recognizing the severity of discharge as a disciplinary measure, argues that it has a lesser standard of proof than that required under usual just cause provisions and that the evidence in this case justifies its action. It points out that there are two classes of offenses in disciplinary cases, those involving extremely serious misconduct which justify summary discharge and those of a less serious nature which require the application of progressive discipline. Management characterizes Grievant's conduct as being dishonest.

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[5] The Arbitrator has carefully read and studied each of the arbitration decisions cited by the Employer in support of this proposition. To the extent that those decisions support the proposition, and two of them, Okenite Company, 22 LA 756 (Krivonos, 1954) and Meletron Corporation 24 LA 680 (Warren, 1955), are to be considered definite support for what the Employer argues, the Arbitrator declines to follow them as he believes they fail to recognize the significance of the concept of seniority in labor relations. The concept of seniority, as set forth in this Agreement, is more fully elaborated upon later in this Decision.

His conduct was detrimental to the public image of the Employer which was justified, if not compelled, to rectify the situation. Further, Grievant's actions were abusive towards the customer and when such actions prompt customer complaints, they are grounds for discharge. Finally, the Employer relies upon the oft quoted language found in Stockham Pipe Fittings, Co., 1 LA 160 (1945), to the effect that it is primarily Management's function to decide upon the penalty in any given case and that an arbitrator should not disturb that penalty if Management acts in good faith and upon a fair investigation.

DISCUSSION

Any analysis of the subject of management rights in labor relations must begin with the proposition that absent the prohibitions of a contract or a statute or other overriding instrument of public policy, management has the absolute and unfettered right to do so as it pleases. In that circumstances, whim sometimes operates more

efficaciously than does reason. Because of whim's efficacy, certain inroads began to appear in such areas as worker's compensation, unemployment insurance, wage and hour laws, child labor laws and the like. Workers began to organize against management's whim. Working rules developed and concerted strike activity withdrew from the area of law dealing with criminal conspiracies and emerged as a right to be protected.

Once begun, the movement continued with the enactment of the National Labor Relations Act and its progeny. The Civil Rights Act, the Age Discrimination Act and the Occupational Health and Safety Act, to name a few, followed. The national labor policy settled upon favoring the arbitration of labor disputes to resolve differences and to avoid strikes. Labor arbitration flourished. These inroads on unfettered and absolute management rights have developed into a full-blown, full-scale code of conduct governing the relationship of employer and

employee.

That process began in this case in 1951, when the Parties entered into what was evidentally their first Collective Bargaining Agreement. The process continued to date and is now evidenced by the Agreement which is applicable to this dispute and which was ratified by the Union the night before Grievant's discharge.

Under the management rights clause, Management has reserved unto itself not the absolute unfettered right to discharge, but rather the right to discharge subject, however, to the provisions of the Agreement. In thus reserving its right to discharge, Management is not saddled with ny limiting language such as cause, just cause or proper cause. But is is saddled with the subjugation of the right to discharge to the other provisions of the agreement.

One of the other provisions of the Agreement is the seniority provision found in Article VI. The

first Article VI tells us is that seniority is an employee right. That right is the result of the employee's length of service with the Employer. Among the things that right entitles the employee is the employee is the right to be retained in the Employer's service so long as he is able to perform his required duties. No credible argument is made in this case that Grievant is not able to perform his required duties. (See footnote 4, supra.)

Having the right to be retained in his employment because of his seniority, the employee is, however, liable to lose that right, and the other rights to which seniority entitles him, upon the happening of certain designated events, one of which is discharge for cause. If a discharge is not for cause, it logically follows that an employee does not lose his seniority and its entitlements, one of which is the right to be retained in service. Therefore, the employee is entitled to continue to work for the Employer and to draw his pay and other

benefits. If his seniority is not broken, but the Employer nevertheless refuses to allow the employee to work, it seems that the employee's right to pay and other benefits would continue.

Therefore, to fully accept the Employer's argument that it does not need just cause -- or cause if you will, the terms are virtually synonymous -- would result in employees, whom the Employer has discharged without cause, remaining on the the payroll without the necessity of working for their pay. That, I think, is not what the Union bargained for. It is not, I think, what the Employer intended to grant when the Collective Bargaining Agreement was entered into. Rather, what the Parties contemplated was a restriction on the unfettered and absolute right of Management to discharge. They have seen fit to describe that restriction by the use of the words "discharge for cause".

What cause, then, must Management have?

Management does not argue that it may be unreasonable, that it may be arbitrary or that it may be capricious in its cause. Each instance of discharge will necessitate an examination of the circumstances surrounding the employee conduct and Management's reaction thereto to determine whether cause, if fact, exists. If the circumstances surrounding the employee conduct are sufficiently egregious, summary dismissal is warranted unless Management's reaction to the employee conduct can be shown to be unreasonable, arbitrary or capricious. If the circumstances surrounding the employee conduct are of a less serious nature and Management's reaction thereto is reasonable, discharge would not be assessed, but rather a lesser penalty, such as progressive discipline, would be imposed. In other words, the Employer must have reasonable cause to discharge an employee. It is described as just cause by other parties. That is the standard which must be applied in this case.

Ignoring for the moment the questions raised by the reaction of Management in this case and looking only to the circumstances surrounding the employee conduct, the Arbitrator finds that Management had cause, and cause again, for the summary dismissal of Grievant. The Arbitrator has carefully studied his notes taken during the hearing, has reviewed the tape recorded transcript of the hearing and has recalled the demeanor of the witnesses as they testified. He has concluded that the circumstances surrounding the employee conduct in this case justifies the conclusion that Grievant repeatedly, boldly and blatantly attempted to engage the owner of the resort in a dishonest scheme to shift the financial burden of his family's lodging from himself to the Employer. Standing alone, this conduct warrants summary discharge.

But, the Employee's conduct does not stand alone. Management's reaction to that conduct must be taken into consideration.

What was Management's reaction? It could be characterized in a number of ways, but it could not be characterized as summary. Upon learning of the incidents at the resort from its secret informant, management inquired into the circumstances by contacting the owner. Thereafter it did nothing until July 21.

The General Manager explained the delay by saying that he had been giving the matter serious consideration and had hoped that the owner of the resort would change her mind concerning not allowing Grievant to stay at the resort in the future. Because the crew had to be sent to Theodoshia again and because of the resort owner's continuing attitude toward Grievant, he had to be discharged as the Company could not have Grievant housed in one place and the remainder of the crew elsewhere.

The Union's Business Manager testified that the General Manager told him the delay was because of the negotiations. For the same reason as stated in

footnote 3, I find that the General Manager delayed the discharge in this case either because he did not feel that Grievant's offense was that serious or because of the pending labor negotiations.

As indicated earlier, I view Grievant's conduct as warranting summary dismissal. I will not speculate as to what impact his summary discharge might have had upon the negotiations.

But the resultant delay is an intervening cause interposed by Management upon the circumstances and is a part of Management's reaction. By interposing the delay, Management took the chance that nothing would happen in the interim which would effect the overall determination of whether cause exists in this case.

Something did happen. Grievant attended two Union meetings and boldly and blatantly encouraged his fellow employees to engage in concerted activities and to reject Management's proposals. It was Grievant's legitimate right to do so. Word of

Grievant's conduct at the Union meetings got back to the General Manager. He knew of Grievant's comments regarding sit-ins and the blue flu. He knew of Grievant's vocal opposition to acceptance of the Employer's contract terms. As soon as the contract was ratified, he immediately discharged Grievant.

What were his reasons, his motives in discharging Grievant. Motive -- one's state of mind -- is a factor which must be considered in any case involving the possible application of discipline against an employee because of his union activities. One substantial test of motive is the timing in which certain acts are taken. Another reliable test is the statements made by an actor at, about and concerning the circumstances in which he acted.

In this case we have the imposition of discharge six weeks after the occurrence, but at the first opportunity after Management had the Collective Bargaining Agreement ratified by the Union over Grievant's vocal opposition. We have the

General Manager's statements to the Union representatives made within days of the discharge concerning Grievant's verbalization at the Union meeting. These factors, juxtaposed with each other, lead the Arbitrator to the conclusion and the holding that Grievant's discharge was motivated in substantial part and impelled by his union activities. Indeed, that conclusion, in the circumstances of this case, seems inescapable.

Having concluded that Grievant's conduct of June 8, 9 and 10 amounted to serious dishonesty which, if standing alone, would justify his summary discharge, but that the motivating factor, at least in substantial part, which impelled Management to the decision to discharge him was his union activities, the Arbitrator finds that Grievant's discharge was not proper under the Parties Agreement.

Grievant is deserving of serious discipline in this case. But the discharge itself cannot stand

because of the General Manager's improper - indeed, unlawful - motivation involving Grievant's activities. To allow the discharge to stand would result, in the Arbitrator's judgment, in too chilling an effect upon the free exercise of the fundamental right of Grievant and each of his fellow employees to engage in concerted activities and to bargain collectively with the Employer. Grievant will therefore be reinstated without any provision for back pay.

The Arbitrator realized this is a financial loss to Grievant which approximates $13,000.00. Grievant should realize that it is solely due to his dishonest conduct. The Employer should realize that Grievant's reinstatement is due solely to it's improper and unlawful motivation. Because of that motivation, and in an attempt to see to it that Management's excuse in this case is not again used as a pretext, the Arbitrator shall make provision that all reference to the incidents at the resort

shall be expunged from the Company's records and that the incidents that occurred at the resort shall not be used in the future in any manner by the Employer toward Grievant in their employment relationship. Such a provision, of course, is not self-enforcing. But, a watchful union should be able to see that it is enforced, if future events make that necessary.

AWARD

The grievance is sustained. Grievant's discharge was not proper under the Contract between the Employer and the Union. He shall be reinstated to his employment and his former position shall be restored him without back pay, but with all other rights and benefits to which uninterrupted seniority entitles him. All reference to Grievant's conduct at the Theodoshia Marina and Resort on June 8, 9 and 10, 1981, shall be expunged from the Employer's records. In the future, the Employer shall make no reference to and no use of the incidents which

occurred at the Theodoshia Marina and Resort in its employment relationship with Grievant.

William O. Eisler
Arbitrator

February 24, 1982.

"APPENDIX C: District Court Order"

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 53, AFL-CIO Plaintiff, vs. SHO-ME POWER CORPORATION, Defendant.	No. 82-3097 CV-S-4

ORDER

Plaintiff filed this action on March 11, 1982 seeking enforcement of an arbitration award. On May 20, 1982 plaintiff filed a motion for summary judgment, a motion for a preliminary injunction, and a request for a show cause hearing. Defendant responded with its motion for summary judgment on May 28, 1982. For the following reasons, the Court will deny plaintiff's motions and will enter summary judgment in favor of defendant.

The Court finds the following facts to be undisputed. Plaintiff is an unincorporated labor organization with its principal place of business in Kansas City, Missouri. Defendant is a Missouri

corporation operating in southwest Missouri as a regulated public utility. Federal jurisdiction arises under 29 U.S.C. § 185(a) and 28 U.S.C. § 1337.

At all times material to this action plaintiff represented certain employees of defendant in the negotiation and administration of collective bargaining agreements. On July 1, 1981 plaintiff and defendant executed a collective bargaining agreement. Article I, Section 2 of that agreement reserved certain rights to defendant in the following manner:

> The Union recognizes that Management of the Corporation, the direction of its working forces, the determination of the number of men it will employ or retain, the right to hire, discharged, promote, demote, transfer, and release employees is vested in and reserved by the Corporation, subject, however, to the provisions of this Agreement.

Of particular relevance in this case was Article V of the agreement which outlined a four step grievance procedure. Section 1 of Article V defined the scope of that procedure as follows:

> Should any differences or disputes arise under any provisions of this Agreement between an employee or a group of employees and a representative of the Corporation, such differences shall be settled in the following manner and shall receive prompt consideration.

Steps 1, 2 and 3 of the procedure required initial discussions with an employee's immediate supervisor, departmental supervisor, and the corporation's general manager respectively. Step 4 provided in relevant part as follows:

> If no settlement is then reached, any matter or matters remaining in dispute shall, at the request of the delegated representative of either or both parties, be submitted to arbitration as follows:
>
> > Step 4A. The Arbitration board shall consist of one person selected by the Corporation and one person selected by the Union, and these two persons shall select the third party to the Arbitration Board. In the event these two persons fail to agree on a third party to the board, they shall then request the Chairman of the Missouri State Board of Mediation to appoint the third member of the Board. . .
> >
> > Step 4C. All decisions rendered by the Arbitration Board shall be final and binding upon both parties, and shall be in writing and each party shall be furnished with a copy thereof. In no event shall this board have the authority to amend or change any of the provisions of this

Agreement.

Additional relevant provisions were contained in Article VI which dealt exclusively with seniority rights. Section 1 of that article defined seniority as:

> a right accruing to employees as a result of length of service with the corporation which entitles them to preference, qualifications and ability being equal, to retention in service, layoffs, permanent transfers, and in rehiring, providing the employee is able to perform the required duties.

Section 5 of Article VI provided that:

> Seniority shall be lost by the occurrence of any of the following:
>
> * * *
>
> (b) Discharge for cause . . . .

These provisions applied to all of defendant's union employees who were represented by plaintiff after July 1, 1981.

On July 21, 1981 defendant discharged one Stephen M. Thornton, a member of plaintiff's union. Plaintiff and Thornton immediately filed a grievance requesting reinstatement with full back pay,

seniority, and benefits. Following a series of unfruitful meetings, the parties agreed to submit the grievance to arbitration. The Missouri State Board of Mediation then appointed Mr. William O. Eisler as the neutral third board member pursuant to the collective bargaining agreement. Arbitrator Eisler convened a hearing on December 10, 1981. At the commencement of that hearing, the parties waived the requirement of a tripartite board and agreed that Mr. Eisler would act as the sole arbitrator. On February 24, 1982 Arbitrator Eisler issued his decision sustaining Thornton's grievance and awarded reinstatement with full seniority and benefits except backpay. After defendant refused to reinstate Thornton, plaintiff filed this action to enforce the arbitrator's award. In Harvill v. Roadway Express, Inc., 640 F.2d 167, 169 (8th Cir. 1981), the Eighth Circuit Court of Appeals stated that the "duty of a court is to enforce an arbitration award unless there are significant

reasons to the contrary." The Circuit Court also emphasized that "a court has no business weighing the merits of a grievance." Id. Consequently, the Court must subject the arbitrator's award to pre-enforcement review, but the scope of that review is severly limited.

The Supreme Court defined the standards for reviewing arbitration awards in a series of cases commonly known as the "Steelworkers Trilogy." See United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564 (1960; United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S.574 (1960); and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). As succinctly summarized by plaintiff in its suggestions supporting its motion for summary judgment, those cases restrict judicial review of an arbitration award to a consideration of three issues: (1) whether the parties have agreed to submit the

dispute to arbitration; (2) whether the arbitrator acted within the scope of the authority granted to him; and (3) whether the award "draws its essence" from the agreement. Accordingly, the Court has carefully reviewed the arbitrator's award in light of these three issues.

The Court initially finds that the parties clearly agreed to submit their dispute to arbitration. Article V, Section 1 of the collective bargaining agreement provided that "any differences or disputes [which] arise under any provisions of this Agreement between an employee . . . and a representative of the Corporation . . . shall be settled in the following manner . . . ." (emphasis added). Step 4 of the Grievance Procedure specified arbitration as the final method for dispute resolution. Since the grievance in this case concerned the propriety of defendant's action in discharging Thornton, the parties' dispute arose under the collective bargaining agreement and,

therefore, was subject to arbitration.

The Court also finds that the arbitrator acted within the scope of his authority in interpreting various terms within the collective bargaining agreement. Plaintiff submitted the following issue for arbitration: "Was the discharge of [Grievant] for just cause? If not, what it the appropriate remedy?" Defendant worded the issue as follows: "Whether or not the discharge of [Grievant] was proper under the Agreement between Local Union 53 of the I.B.E.W. and Sho-Me Power Corporation." the arbitrator, however, found that "[b]oth questions ask the same thing and both require the same answer." Decision and Award at p.2. The arbitrator based this decision upon his interpretation of Article 1, Section 2, which defines management rights, and Article VI, Sections 1 and 5, which define employee seniority rights and further provide that those rights may be lost as a result of "Discharge for cause." The arbitrator found that management's

authority to discharge an employee was limited by the specific conditions governing the loss of employee seniority rights and that, as a result, management could not discharge an employee except "for cause." The arbitrator then interpreted "cause" as synonymous with "just or reasonable cause" and found that those terms imposed an obligation on management to refrain from unreasonable, arbitrary, or capricious actions. Since an inherent tension existed between management's right to discharge an employee and the conditions governing the loss of employee seniority, the arbitrator in this case possessed the authority to interpret the collective bargaining agreement and to resolve that tension. Vulcan-Hart Corp. v. Stove Workers Local 110, 671 F.2d 1182 (8th Cir. 1982). The Court cannot interfere with such a decision "unless it can be said with positive assurance that the contract is not susceptible of the arbitrator's

interpretation." Kewanee Machinery Division v. Local Union No. 21, International Brotherhood of Teamsters, 593 F.2d 314, 317-18 (8th Cir. 1979). Such assurance does not exist in this case. Nevertheless, after careful consideration the Court finds that the arbitrator's award fails to "draw its essence" from the collective bargaining agreement.

As noted above, the arbitrator found that Article VI, sections 1 and 5 prohibited discharge without reasonable or just cause and that those terms, in turn, prohibited unreasonable, arbitrary, or capricious imposition of discipline by management. The arbitrator also found, however, that "Management had cause, and cause again, for the summary dismissal of Grievant." Decision and Award at 12. The arbitrator did not find management's actions to be unreasonable, arbitrary, or capricious. Instead, the arbitrator explained the basis of his award as follows:

> Having concluded that Grievant's conduct of June 8, 9 and 10 amounted to serious

> dishonesty which, if standing alone, would justify his summary discharge, but that the motivating factor, at least in substantial part, which impelled Management to the decision to discharge him was his union activities, the Arbitrator finds that Grievant's discharge was not proper under the Parties' Agreement.

Decision and Award at 15. Although the arbitrator had interpreted the collective bargaining agreement to prohibit only unreasonable, arbitrary, or capricious Management action, the arbitrator ultimately based his award upon his perception of the motivation underlying management action which was acceptable in all other respects. The arbitrator previously had not interpreted the collective bargaining agreement to impose such a restriction, and frankly admitted that his award was based solely upon his own interpretation of desirable social policy. Thus, the arbitrator reasoned that "[t]o allow the discharge to stand would result, in the Arbitor's judgment, in too chilling an effect upon the free exercise of the fundamental right of Grievant and each of his fellow employees to engage in concerted activities and to

bargain collectively with the Employer." Decision and Award at 15. As the Supreme Court stated in Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), "an arbitrator is confined to interpretation and application of the collective bargaining agreement: he does not sit to dispense his own brand of industrial justice. . . . When an arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (emphasis added). According, it is hereby

ORDERED that plaintiff's motion for summary judgment, a preliminary injunction, and a show cause hearing are denied; and it is further

ORDERED that defendant's motion for summary judgment is granted.

RUSSELL G. CLARK,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: July 30, 1982

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2007

International Brotherhood of Electrical Workers, Local Union No. 53, AFL-CIO,	*	
Appellant,	*	
v.	*	Appeal from the United States
Sho-Me Power Corporation,	*	District Court for the Western District
Appellee.	*	of Missouri

Submitted: April 15, 1983

Filed: September 2, 1983

Before BRIGHT and FAGG, Circuit Judges; and REAGAN, Senior District Judge.*

BRIGHT, Circuit Judge.

The International Brotherhood of Electrical Workers, Local 53 (Union) appeals from the district court's judgment which refused to enforce an arbitrator's award ordering the She-Me Power Corporation (Utility) to reinstate without backpay a Union member, Stephen Thornton, to his former job with the Utility. The district court ruled that the arbitrator's award failed to draw its essence from the collective bargaining agreement between the Utility and the Union, and, therefore, granted the Utility's motion for summary judgment. We reverse and remand.

I. Background

Stephen Thornton worked for the Utility as an

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* JOHN K. REAGAN, United States Senior District Judge for the Eastern District of Missouri, sitting by designation.

equipment operator-truck driver. During the weekend of June 5, 1981, Thornton's foreman advised Thornton that for the following week he had been assigned to work out of town with a crew at the Utility's substation in Gainesville, Missouri. The foreman told Thornton that the Utility would house the crew at the Theodoshia Marina and Resort (Resort) at Theodoshia, Missouri, but that Thornton would be responsible for his family's accommodations.

On June 8, Thornton and the other members of the Utility's work crew checked in at the Resort. The Resort's owner informed Thornton that he would be charged extra if his family wished to stay at the Resort. Thornton's family arrived at the Resort of June 9 and stayed through June 11. On several occasions during the week Thornton attempted to persuade the Resort's owner to waive the additional charges for Thornton's family or to include the additional charges in the Utility's bill. After

several requests, the Resort's owner agreed to reduce the additional charges for Thornton's family.

Six weeks later, on July 21, the Utility discharged Thornton. The Utility's general manager explained the Utility's reasons for firing Thornton in a letter given to Thornton on the same day:

> It has come to my attention that while on Sho-Me business, you and your family stayed at the Cook's Marina at Theodoshia, Missouri. You were advised by your Supervisor, Lesley Trantham, that no special compensation from Sho-Me in the manner of lodging expense would be allowed for your family. After being denied compensation for your family and during that stay you attempted to coerce the owners into increasing the nightly lodging rate paid by Sho-Me to cover the added cost of your family.
>
> The owners refused your repeated efforts and have advised me that you are no longer welcome at their facilities either as a private guest of the motel or when you are on Sho-Me's business at the company's expense.
>
> **Mr. Charles Brown, the Ozark County Prosecutor has advised me that your alleged actions are considered "attempted stealing by deceit" which according to the criminal statutes of Missouri is a class "C" misdemeanor punishable by a maximum fine of $300 and 15 days in jail.**

> Based on your actions, you are hereby advised that you are immediately terminated. Please contact the Director of Personnel to arrange the final settlement of the Sho-Me employment Benefit program.

During the six week interval between Thornton's stay at the resort and his termination, the Utility did not question Thornton or any of his co-workers about the incident. At the time, the Union and the Utility were engaged in difficult contract negotiations. At a Union meeting on July 2, the bargaining unit voted to reject the Utility's proposed contract. Although the Union requested its International Union to sanction a strike, the negotiations continued. Finally, on July 20, the bargaining unit voted at another meeting to ratify the Utility's second proposed contract.

At both of these meetings, Thornton attacked the Utility's proposals. In fact, the arbitrator found that "[o]ther employees spoke against ratification of the Agreement at both meetings but not as strongly as did [Thornton]." He spoke of

engaging in sit-ins and "blue flu" work stoppages. The day after the Union voted to ratify the Utility's second proposal, July 21, the Utility discharged Thornton.

Three days later, the Utility's general manager met with the Union's business manager concerning Thornton's discharge. The business manager asked the general manager why the Utility had waited so long before discharging Thornton. The general manager stated that the Utility waited because it had wanted to give the matter serious consideration, and, also, because of the contract negotiations. The general manager specifically referred to Thornton's remarks at the Union's meeting concerning "blue flu" work stoppages.

Subsequently, the Union and Thornton filed a grievance. Thereafter, the parties submitted the matter to arbitration. After conducting a hearing, the arbitrator stated:

> In this case we have the imposition of discharge six weeks after the occurrence, but

> at the first opportunity after Management had the Collective Bargaining Agreement ratified by the Union over Grievant's vocal opposition. We have the General Manager's statements to the Union representatives made within days of the discharge concerning Grievant's verbalization at the Union meeting. These factors, juxtaposed with each other, lead the Arbitrator to the conclusion and the holding that Grievants' [sic] discharge was motivated in substantial part and impelled by his union activities. Indeed, that conclusion, in the circumstances of this case, seems inescapable.
>
> Having concluded that Grievant's conduct of June 8, 9 and 10 amounted to serious dishonesty which, if standing alone would justify his summary discharge, but that the motivating factor, at least in substantial part, which impelled management to the decision to discharge him was his union activities, the Arbitrator finds that Grievant's discharge was not proper under the Parties' Agreement.
>
> Grievant is deserving of serious discipline in this case. But the discharge itself cannot stand because of the General Manager's improper - indeed, unlawful - motivation involving Grievant's activities.
>
> * * * Grievant will therefore be reinstated without any provision for back pay.

Because the Utility refused to comply with the arbitrator's award, the Union sought enforcement in the district court.

At the outset, the district court determined

that the parties had agreed to submit their dispute to arbitration and that the arbitrator had acted within the scope of his authority in interpreting various terms under the collective bargaining agreement. The court, however, went on to conclude that the arbitrator's award failed to draw its essence from the collective bargaining agreement. The district court reasoned:

> Although the arbitrator had interpreted the collective bargaining agreement to prohibit only unreasonable, arbitrary, or capricious Management action, the arbitrator ultimately based his award upon his perception of the motivation underlying management action which was acceptable in all other respects. The arbitrator previously had not interpreted the collective bargaining agreement to impose such a restriction, and frankly admitted that his award was based solely upon his own interpretation of desirable social policy. Thus, the arbitrator reasoned that "[t]o allow the discharge to stand would result, in the Arbitor's judgment, in too chilling an effect upon the free exercise of the fundamental right of Grievant and each of his fellow employees to engage in concerted activities and to bargain collectively with the Employer."

Consequently, the court granted the Utility's motion

for summary judgment and denied enforcement of the arbitrator's award. This appeal followed.

II. Discussion

The Supreme Court enunciated the general principles governing judicial review of three seminal cases which have come to be known as the "Steelworkers Trilogy." United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co. 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel & Car Corp. 363 U.S. 593 (1960). A reviewing court must uphold an arbitrator's award so long as it "draws its essence" from the collective bargaining agreement. United Steelworkers of America v. Enterprise Wheel & Car Corp., supra 363 U.S. at 596-97; Lackawanna Leather Co. v. United Food & Commercial Workers, International Union, AFL-CIO & CLC, 706 F.2d 228 (8th Cir. 1983) (en banc). If the award does not draw its essence from the contract,

the reviewing court must vacate or modify the award.[1] Reviewing courts, however, will broadly construe the collective bargaining agreement's grant of power to the arbitrator. Resilient Floor and Decorative Covering Workers, Local Union 1179 v. Welco Manufacturing Co., 542 F.2d 1029, 1032 (8th Cir. 1976). Moreover, it is not within the court's scope of review to judge the merits of a grievance. Kewanee Machinery Division v. Local Union No. 21, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 593 F.2d 314

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[1] The Supreme Court has stated:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, 363 U.S. at 597.]

317 (8th Cir. 1979).

The Union contends the district court erred in ruling that the arbitrator's award failed to draw its essence from the collective bargaining agreement.[2] We agree.

Our starting point is the collective bargaining agreement between the Utility and the Union. The agreement provides, in pertinent part:

> Article I, Section 2.
>
> The Union recognizes that Management of

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[2] We note that the Utility contends the district court erred in sustaining the arbitrator's interpretation of the term, "discharge for cause," contained in the collective bargaining agreement. We reject this contention. An arbitrator may interpret, construe or apply the provisions of a collective bargaining agreement if the contract does not limit his authority to do so. Vulcan-Hart Corp. v. Stove, Furnace, & Allied Appliance Workers International Union, Local 110, 671 F.2d 1182 (8th Cir. 1982). Here, the agreement does not limit the arbitrator's authority to interpret, construe or apply the agreement. As we discuss, infra, the arbitrator acted within his authority in interpreting the collective bargaining agreement and his award drew its essence therefrom. Accordingly, the award should be enforced.

the Corporation, the direction of its working forces, the determination of the number of men it will employ or retain, the right to hire, discharge, promote, demote, transfer, and release employees is vested in and reserved by the Corporation, subject, however, to the provisions of this Agreement.

* * * *

Article V, Step 4.C
All decisions rendered by the Arbitration Board shall be final and binding upon both parties.* * * * In no event shall this board have the authority to amend or change any of the provisions of this agreement.

* * * *

Article VI, Seniority, Section 1.
Seniority is a right accruing to employees as a result of length of service with the Corporation which entitles them to preference, qualifications and ability being equal, to retention in service,* * * providing the employee is able to perform the required duties.

* * * *

Article VI, Section 5.
Seniority shall be lost by the occurrence of any of the following:

* * * *

b. Discharge for cause * * *.

The collective bargaining agreement empowers the arbitrator to determine whether the Utility's discharge of Thornton was "for cause." In his award, the arbitrator concluded, "[Thornton's] discharge was not proper under the Contract between the [Utility] and the Union." We conclude the arbitrator's award draws its essence from the collective bargaining agreement.

The arbitrator's award is based on his interpretation of the collective bargaining agreement's "discharge for cause" provision. The arbitrator considered this phrase, the parties' arguments and the witnesses' testimony, and concluded that the Utility's discharge of Thornton did not meet the collective bargaining agreement's standards for cause. The arbitrator, by necessity, had to give meaning to the collective bargaining agreement's "discharge for cause' provision. The meaning of this term is not apparent on its face. Interpreting this standard merely as requiring that the Utility

have some "cause" for discharging an employee, renders it superfluous; unless the Utility randomly discharges its employees, it will always have some "cause" as a reason for its discharge of an employee. The arbitrator considered the "discharge for cause" provision in the context of the collective bargaining agreement as a restriction on the generally unfettered right of an employer to discharge its employees.

The arbitrator interpreted "cause" as synonymous with "just or reasonable cause" and determined that these terms imposed on management an obligation to refrain from unreasonable, arbitrary, or capricious actions. The district court did not dispute the arbitrator's interpretation and neither will we. As the district court properly noted, courts cannot interfere with an arbitrator's interpretation "unless it can be said with positive assurance that the contract is not susceptible of the arbitrator's interpretation." Quoting, Kewanee

Machinery Division v. Local Union No. 21, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra 593 F.2d at 318. The Utility has not pointed to, nor do we find, any evidence which gives us positive assurance that the agreement was not susceptible to the arbitrator's finding that the collective bargaining agreement required "just cause" before the Utility could discharge an employee.

The arbitrator found Thornton guilty of dishonesty serious enough to merit discharge. The arbitrator concluded, however, that the Utility discharged Thornton because of his protected union activities. Consequently, the arbitrator found Thornton's discharge to have been improper under the collective bargaining agreement and directed the Utility to reinstate him without backpay[3]. It is unimportant whether we agree with the arbitrator's

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[3] The Union has not challenged the arbitrator's denial of backpay.

interpretation of the collective bargaining agreement. "It is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." United States Steelworkers of America v. Enterprise Wheel & Car Corp., supra 363 U.S. at 599. See also, Lackawanna Leather Co. v. United Food & Commercial Workers International Union, AFL-CIO & CLC, supra, 706 F.2d at 213-32; cf. United Electrical, Radio and Machine Workers of America, Local 119 v. Litton Microwave Cooking Products, Litton Systems, Inc., 704 F.2d 393 (8th Cir. 1983), rehearing en banc granted. The arbitrator's award in this case draws its essence from the collective bargaining agreement and, accordingly, should be enforced.

III. Conclusion.

For the reasons stated in this opinion,

the judgment of the district court is reversed. We remand with directions that the district court grant summary judgment in favor of the Union and order enforcement of the arbitration award.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT

STATEMENT OF CORPORATE AFFILIATIONS

Sho-Me Power Corporation is a Missouri general business corporation. Sho-Me Power Corporation has no parent companies or subsidiary companies. Sho-Me Corporation is affiliated with nine distribution cooperatives who are members of Sho-Me Power Corporation. These nine corporations are: Crawford Electric Cooperative, Inc., Gascosage Electric Cooperative, Howell-Oregon Electric Cooperative, Intercounty Electric Cooperative Association, Laclede Electric Cooperative, Webster Electric Cooperative, and White River Valley Electric Cooperative Association, all Missouri corporations.

Sho-Me Power Corporation is also affiliated with Associated Electric Cooperative, Inc. and M & A Electric Power Cooperative, both Missouri corporations.